

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN MCVAY,

Petitioner,

v.

STEVEN "MIKE" MERLAK,

Respondent.

No. 1:20-cv-00486-DAD-JDP (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DENYING
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND DISMISSING
PETITION

(Doc. Nos. 5, 7)

Petitioner Steven McKay is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304.

On April 15, 2020, petitioner filed a motion seeking a temporary restraining order to prevent his transfer to a different prison because that transfer would place him in immediate danger due to the possibility of contracting the COVID-19 virus at the alternate facility. (Doc. No. 5.) While that motion was pending before this court, petitioner was released from prison to home confinement in May 2020. (*See* Doc. No. 7 at 2, n.2.)

On June 3, 2020, the assigned magistrate judge issued findings and recommendations recommending that petitioner's motion for a temporary restraining order be denied and that his petition for federal habeas relief be dismissed as having been rendered moot by his release to

1 home confinement. (Doc. No. 7.) The pending findings and recommendations were served by mail
2 on petitioner at his address of record on June 3, 2020 and contained notice that any objections
3 thereto were to be filed within fourteen (14) days of service. (*Id.* at 3.) On June 8, 2020, that
4 service copy of the findings and recommendations was returned to the court as “undeliverable,
5 not deliverable as addressed, unable to forward.” Petitioner was required by rule to file a notice
6 of change of address with this court by August 17, 2020, and he did not do so. No objections to
7 the pending findings and recommendations have been filed with the court, and the time for doing
8 so has expired. Petitioner has also failed to file a notice of change of address with the court as
9 required, or otherwise communicate with the court regarding this action following the issuance of
10 the pending findings and recommendations.

11 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
12 *de novo* review of this case. Having carefully reviewed the entire file, the court concludes that
13 the findings and recommendations are supported by the record and proper analysis. Accordingly,
14 petitioner’s motion for a temporary restraining order will be denied and the pending petition will
15 be dismissed as having been rendered moot.

16 Additionally, the court declines to issue a certificate of appealability. A petitioner seeking
17 writ of habeas corpus has no absolute right to appeal; he may appeal only in limited
18 circumstances. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Rule
19 11 of the Rules Governing Section 2254 Cases requires that a district court issue or deny a
20 certificate of appealability when entering a final order adverse to a petitioner. *See also* Ninth
21 Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). The court will
22 issue a certificate of appealability “if jurists of reason would find it debatable whether the petition
23 states a valid claim of the denial of a constitutional right and that jurists of reason would find it
24 debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529
25 U.S. 473, 484 (2000). Here, reasonable jurists would not find the court’s decision to dismiss the
26 petition as having been rendered moot to be debatable or conclude that the petition should
27 proceed further. Thus, the court declines to issue a certificate of appealability.

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Accordingly,

1. The findings and recommendations issued on June 3, 2020 (Doc. No. 7) are adopted in full;
2. Petitioner's motion for a temporary restraining order (Doc. No. 5) is denied;
3. The petition for writ of habeas corpus is dismissed as having been rendered moot;
4. The court declines to issue a certificate of appealability; and
5. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: September 1, 2020

Dale A. Droyd
UNITED STATES DISTRICT JUDGE